IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 85651
	)	
DAVID B. GARRETT,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI
TWENTY-NINTH JUDICIAL CIRCUIT, DIVISION TWO
THE HONORABLE DAVID C. DALLY, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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***CASES*:**

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JURISDICTIONAL STATEMENT

Appellant, David Garrett, incorporates herein by reference the Jurisdictional Statement from his opening brief as though set out in full.

STATEMENT OF FACTS

Mr. Garrett incorporates herein by reference the Statement of Facts from his opening brief as though set out in full.

POINT RELIED ON[1]

I.

The trial court abused its discretion in overruling defense counsel's hearsay objections and allowing the prosecutor to repeatedly inform the jury in opening statement, closing argument and throughout the testimony of Officer Altic, that a confidential informant had made specific statements linking Mr. Garrett to the drugs at 1624 Virginia, because this ruling deprived Mr. Garrett of his rights to due process, confrontation and a fair trial, as guaranteed by the 5th, 6th and 14th Amendments to the U.S. Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the non-testifying informant's statement that "David Garrett was dealing narcotics from his residence at 1624 Virginia" was offered in evidence and then emphasized in argument to prove the truth of the matter asserted and not to show subsequent conduct by the police. Mr. Garrett was prejudiced because the State's evidence connecting Mr. Garrett to the drugs was tenuous, and the prosecutor urged the jury to use the confidential informant's hearsay statement to "connect some more dots" about Mr. Garrett's connection to the drugs, noting that the informant's statements that "the Defendant was selling drugs at 1624 Virginia and the Defendant lived at 1624 Virginia...it sure panned out, didn't it?"

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[1] Mr. Garrett replies to Point I of Respondent's Brief and relies on his opening brief as to Points II and III.

Crawford v. Washington, 541 U.S. ___, 2004 WL 413301 (March 8, 2004);

State v. Kirkland, 471 S.W.2d 191 (Mo. 1971);

People v. Singletary, 652 N.E.2d 1333 (Ill. App. 1995);

State v. Dunn, 817 S.W.2d 241(Mo. banc 1991);

U.S. Const., Amends 5, 6, & 14; and

Mo. Const., Art. I, Sections 10 & 18(a).

ARGUMENT

I.

The trial court abused its discretion in overruling defense counsel's hearsay objections and allowing the prosecutor to repeatedly inform the jury in opening statement, closing argument and throughout the testimony of Officer Altic, that a confidential informant had made specific statements linking Mr. Garrett to the drugs at 1624 Virginia, because this ruling deprived Mr. Garrett of his rights to due process, confrontation and a fair trial, as guaranteed by the 5th, 6th and 14th Amendments to the U.S. Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the non-testifying informant's statement that "David Garrett was dealing narcotics from his residence at 1624 Virginia" was offered in evidence and then emphasized in argument to prove the truth of the matter asserted and not to show subsequent conduct by the police. Mr. Garrett was prejudiced because the State's evidence connecting Mr. Garrett to the drugs was tenuous, and the prosecutor urged the jury to use the confidential informant's hearsay statement to "connect some more dots" about Mr. Garrett's connection to the drugs, noting that the informant's statements that "the Defendant was selling drugs at 1624 Virginia and the Defendant lived at 1624 Virginia...it sure panned out, didn't it?"

Crawford v. Washington

Three days after Respondent filed its brief, the United States Supreme Court handed down ***Crawford v. Washington*, 541 U.S. ___, 2004 WL 413301 (March 8, 2004)**. ***Crawford*** represents a change in the law with respect to the admissibility of testimonial hearsay. Under ***Crawford***, such hearsay is barred under the Confrontation Clause, unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness, regardless of whether such hearsay statements are deemed reliable by the court. **(*Crawford*, slip Op. at 18, 23)**. Reliability is no longer the lynchpin to admissibility; confrontation is. The Court explicated the great historical and modern-day dangers of abuse in the admission of out-of-court statements that were not subjected to confrontation, concluding that to "dispens[e] with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." ***Id.* at 27**. Mr. Garrett's trial was infected with out-of-court, testimonial hearsay statements that spoke directly to the elements of the State's case, and Mr. Garrett had no opportunity to confront this damning evidence.

Although ***Crawford*** left "for another day" a comprehensive definition of "testimonial," ***Id.* at 33**, it did provide some guidance. A "testimonial" statement is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." ***Id.* at 15**. "Testimonial statements" might include: affidavits, custodial examinations, depositions, confessions, prior testimony that the defendant was unable to cross-examine, "pretrial statements that declarants would reasonably expect to

be used prosecutorially," "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," and "statements taken by police officers in the course of interrogations." ***Id.* at 15-16**.

Mr. Garrett urges this Court to hold that an out-of-court statement by a confidential informant to police officers, supplying evidence on key elements of the State's case, constitutes a "testimonial statement" under the above criteria. As stated in ***Crawford***, the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse" ***Id.* at 17, 21**. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." ***Id.* at 33**. Mr. Garrett was denied his right to confront the confidential informant and his conviction must be reversed.

A proposed solution for explaining officer conduct

Respondent's argument, that the confidential informant's statements are admissible "to explain subsequent police conduct" (Resp. Br. 14-21), is the same argument that is failing in case after case in appellate tribunals across the country. It fails for two reasons: 1) that is *not* what the testimony was used for; and 2) the police officer's subsequent conduct was not at issue in Mr. Garrett's trial. Other state courts are beginning to respond to the dangers of abuse presented by this catch-all exception, by significantly narrowing its application. See ***State v. Blevins*, 521 N.E.2d 1105, 1109 (Ohio App.,1987)** (Admission of out-of- court statements that defendant sold drugs

to out-of-court declarant should have been excluded because the statements clearly went to an element of the offense, and had little, if any, relevance to the circumstances of the officers' meeting defendant); ***Goodson v. State,* 747 N.E.2d 1181 (Ind.App.,2001)** (Statements by confidential informant had little or no bearing on why a particular course of action was taken by the police during their investigation. Thus, these out-of-court statements were hearsay); ***People v. Tanner*, 564 N.W.2d 197 (Mich.App. 1997)** (defendant's right to confront one of his accusers was violated when the trial court allowed into evidence an affidavit of a police officer containing unsworn statements and information provided by a confidential informant.)

In addition to Indiana, Ohio and Michigan, Mr. Garrett will present the solutions reached by Illinois and Kentucky to address the problem presented by confidential informant hearsay testimony. Mr. Garrett asks this Court to clearly explicate a rule for prosecutors regarding the admissibility of out-of-court statements regarding subsequent officer conduct. The rule he proposes is simple. It is the one this Court has set forth indirectly twice before in ***State v. Kirkland*, *infra***, and ***State v. Dunn*, *infra***: a police officer may testify about substantive information furnished to him *only* where it tends to explain the action that was taken by the police officer *and* the taking of that action is *an issue in the case*.

***CASE STUDY – People v. Singletary*, 652 N.E.2d 1333 (Ill. App. 1995)**

Following a jury trial, defendant, Marvell Singletary was found guilty of possession with intent to deliver more than 15 grams of a controlled substance. ***Id.* at 1334**. The State presented evidence through the testimony of a police officer. ***Id.*** The

officer testified that he received a telephone call from a confidential informant who told him that a person named Marvell, who the informant briefly described, would be in a small blue Dodge or Plymouth hatchback car driving to Dearborn Homes, a housing project at 2971 South Dearborn, to pick up a package of cocaine. ***Id.***

Defense counsel objected to this testimony on the grounds of hearsay. ***Id.* at 1336.** The prosecutor responded, "It's offered to show the reason for what the officer did." ***Id*.** The trial court allowed the testimony "to show why [the officer] went to a certain place and took a certain action." ***Id.* at 1336-1337**.

The appellate court rejected this explanation. It discussed the theory regarding the admission of out-of-court statements to explain a course of police conduct and the danger of misuse of such statements. Quoting Professor McCormick, the court explained:

> In criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct. His testimony that he acted 'upon information received,'[2] or words to that effect, should be sufficient. Nevertheless, cases abound in which the officer is allowed to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports on the ground that he was

[2] "Upon information received" is precisely the phrase used by the Southern District as an example of an acceptable way to explain why Officer Altic arrived at the residence. ***State v. Garrett,* No. 25108, slip op. at 12 (Mo. App., S.D. October 2, 2003).**

> entitled to give information upon which he acted. The need for the evidence is slight, the likelihood of misuse is great.

Id., quoting **McCormick, Evidence § 249 at 734 (3d ed. 1984)**. The court concluded that the testimony of Officer Bunch went beyond what was necessary to explain the officers' conduct and presented the substance of his conversation with the informant. ***Singletary,*** **652 N.E.2d at 1339**. Therefore, the admission of Bunch's testimony as to these statements was error.

Like Mr. Garrett's case, the ***Singletary*** prosecutor also utilized the hearsay testimony at length in his closing argument. The appellate court also rejected this practice, noting:

> [T]he State's remarks here are an example of the recently recognized practice of prosecutors taking improper advantage of the admissibility of testimony by a police officer to explain his investigatory procedure, only to use that testimony, once it is admitted, to impermissibly use it in closing argument. ***Id.*** **at 1339**.

One judge specially concurred, noting that the Illinois Supreme Court had held time and again that police officers may testify about the actions they took after talking to an informant, but they may not testify to the contents of the conversation. ***Id.*** **at 1341 (J. Egan, concurring (citing** ***People v. Gacho,*** **522 N.E.2d 1146 (Ill. 1988) and** ***People v. Jones,*** **606 N.E.2d 1145 (Ill. 1992)**. The Officer may not testify as to "matters material to the trial." ***Id.*** Judge Egan expressed frustration that the words of the Illinois Supreme Court were falling on "deaf prosecution ears," noting the likelihood that the practice

persists because "some prosecutors are ever confident that we will write off the error as harmless." ***Id.***

***CASE STUDY - Sanborn v. Com. of Kentucky,* 754 S.W.2d 534 (Ky. 1988)**

Similar to the situation in ***Singletary, supra***, three officers in ***Sanborn*** testified as to hearsay statements that they obtained during their investigation into the crime. ***Id.* at 541-542**. In each instance the police officer testified as to information furnished to him by persons whom he interviewed. ***Id.* at 542.** The problem was that the information was inadmissible because it was hearsay. ***Id.*** It was relevant for the truth of what was stated, but not for any nonhearsay use to explain the actions of the police officers, because the actions taken by the police officers *were not at issue*. ***Id.***

Reversing, the Court instructed:

> Prosecutors should, once and for all, abandon the term "investigative hearsay" as a misnomer, an oxymoron. The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case. Such information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did. It is admissible *only if* there is an issue about the police officer's action. ***Id.* at 541.** (emphasis in original).

Mr. Garrett urges this Court to explicitly apply this same test in Missouri. The prosecution should only be able to utilize the out-of-court statement of a non-testifying

witness if, and only if, it is necessary to prove why an officer took the action he did, and that police action is a sincere issue in the case - for instance, where the legality of an arrest is at issue. Otherwise, the prosecution should not be allowed to testify as to *the substance* of the out-of-court statement, especially when the statement goes to proving the elements of the State's case. Very simply, the officer could testify that he went to the residence "upon information received" or even "upon information received that drug activity was occurring at the house"; but the officer should not be allowed to testify that he went to the residence because he was told that David Garrett lived at the residence and was selling drugs from the residence. Allowing this testimony permits the State to make the elements of its case through testimony which Mr. Garrett had no right to confront.

***This Court was right in State v. Kirkland*, 471 S.W.2d 191 (Mo. 1971)**

Respondent attempts to diminish the force of this Court's opinion over thirty years ago in ***Kirkland***, wherein this Court rejected the use of out-of-court statements to explain officer conduct because it was not "material or relevant to any issue before the jury. ***Id.* at 194.** In a trial for armed robbery of a cab driver, the out-of-court statement admitted was "Pamela Reynolds and Pete Kirkland got into the cab and left." Based upon this information, the police officer went to Pamela Reynolds house where he found Kirkland and arrested him. ***Id.*** The key issue in the case was identification. ***Id.* at 193**. Despite this link between the statement and the officer's subsequent conduct, such conduct was still not at issue in the case. This Court explained:

> This was certainly good police work; however, neither the fact that Mrs. Mayo made the statement to Jones, nor whether he was justified in relying

> on it, was material or relevant to any issue before the jury. *** In short, officer Jones's state of mind was not material nor relevant to any issue in the case before the jury. The state has not directed our attention to nor can we discern any legitimate jury issue upon which the questioned evidence would have any bearing except the issue of whether or not the defendant did, in truth and fact, board McGuire's cab, as Mrs. Mayo allegedly asserts, and participate in the robbery of McGuire. As to this issue, the truth of the matter asserted is of prime importance and defendant was entitled to cross-examine the person upon whose credit the matter was asserted as being the truth, to wit, Mrs. Mayo. Cross- examination of officer Jones on whether, in fact, Mrs. Mayo made the statements would not suffice as a substitute for cross-examination of Mrs. Mayo to test the truth of the statements. Defendant was denied the right of cross- examination secured by the confrontation clause of the Constitution of Missouri, 1945, Art. I, s 18(a).

***Id.* at 194**.

Respondent argues that "Kirkland has been distinguished" by this Court in ***State v. Brooks*, 619 S.W.2d 22, 25 (Mo. banc 1981)** (Resp. Br. 21). Respondent fails to mention, however, that the hearsay testimony in ***Brooks***, as stated by this Court, "was not relied on to identify defendant nor did it connect defendant with the criminal transaction charged." ***Id.* at 26**. The truth is that ***Brooks*** is distinguishable from both ***Kirkland*** and ***Garrett*** for the very same reason – the out-of-court statements in both ***Kirkland*** and

Garrett were not material to explain officer conduct and they both connected the defendants to the charged crime.

Respondent fails to address this Court's most recent warning

Respondent does not cite to ***State v. Dunn,* 817 S.W.2d 241(Mo. banc 1991)** anywhere in its brief, even though Appellant's opening brief endeavored at length to explain why the Eastern District's opinion in ***State v. Howard,* 913 S.W.2d 68 (Mo. App., E.D. 1995)** was based on a misinterpretation of ***Dunn***. Because Respondent set forth ***Howard*** in its transfer application as a case in conflict with the Southern District's ***Garrett*** opinion, it is surprising that Respondent does not now defend it.

This Court in ***Dunn*** cautioned prosecutors to avoid exactly what happened in this case. But this Court's warning is falling on "deaf prosecution ears." The failure to object to this line of testimony in ***Dunn*** precluded appellate review of the issue. ***Dunn*, 817 S.W.2d at 243**. Nonetheless, this Court cautioned:

> The holding on this point should not be taken to suggest that prosecutors may with impunity elicit hearsay information received from an informant, particularly when the statement directly proves an issue crucial to the state's burden of proof and is offered for the truth of the matter asserted.

***Id.,* fn1.** The time has come for this statement to move from a footnote to a clear, explicit holding that this type of hearsay will no longer infect criminal trials in the State of Missouri.

***State v. Mozee*, 112 S.W.3d 102 (Mo. App., W.D. 2003)**

Finally, within a string cite, Respondent cites to the Western District's recent opinion in ***State v. Mozee, supra***. However, a correct reading of ***Mozee*** proves that Mr. Garrett's position is correct. In ***Mozee***, an undercover officer purchased drugs from an individual at a car wash. ***Id.* at 105**. A confidential informant was also present at the sale. ***Id.*** The officer then went to the Police Department to try to identify the individual that had sold him the crack cocaine after the confidential informant was unable to provide him with a name. ***Id.***

During cross-examination at trial, defense counsel elicited from the officer that the confidential informant had not been able to provide him with the name of the individual that had sold him the drugs. ***Id.* at 106**. The Western District found that this statement – *the informant's inability to identify defendant* – was admissible to explain why the officer then went to the police station to look through pictures. ***Id.* at 108-109**. This is the holding relied upon by Respondent in the case at bar.

What Respondent fails to discuss is the remainder of the ***Mozee*** opinion. The Western District reversed Mr. Mozee's conviction and remanded for a new trial because the State, on redirect of the officer, elicited that the confidential informant identified Mr. Mozee from a photographic lineup. ***Id.* at 109**. Citing cases that describe out-of-court eye-witness testimony as "the rankest kind of hearsay" the Western District reversed because none of the safeguards of the Sixth Amendment were afforded to the defendant. ***Id.* at 108 (*citing State v. Hall*, 508**

S.W.2d 200, 207-208 (Mo. App., W.D. 1974)). Such testimony did not serve any purpose but for the truth of the matter asserted.

The ***Mozee*** court primarily relied upon ***Kirkland, supra***, noting that in both cases the identification evidence from an out-of-court witness denied the defendants their right to cross-examine witnesses against them as secured by the confrontation clause. ***Mozee*, 112 S.W.3d at 109-110**. The Western District also noted that in ***Kirkland***, this Court found prejudicial error despite the fact that the record contained evidence that the victim had positively identified the defendant as his attacker in a lineup within hours of the robbery because the third party identification was "powerful corroborating evidence of identification." ***Id.* at 110**.

Here, the informant's testimony linking Mr. Garrett to the sale of drugs at the house is the same as the identification evidence in ***Kirkland*** and ***Mozee***. Had the informant been required to testify at trial, he or she would have had to testify under oath and been subject to cross-examination regarding the reliability of his or her identification, as well as the extent of his or her bias. "[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." ***Mozee*, 112 S.W.3d at 110** (citation omitted). Through the admission of Officer Altic's hearsay testimony, the State was allowed to admit evidence on every element of its case without affording Mr. Garrett the opportunity to confront and cross-examine the witness. The State then used this testimony for its intended purpose, to "connect the dots" in its case against him (TR 307-308). This Court must reverse.

CONCLUSION

Because the State was allowed to: 1) use inadmissible hearsay of a confidential informant; 2) use inadmissible hearsay of letters addressed to Mr. Garrett; and 3) make a direct reference to Mr. Garrett's failure to testify during closing argument, Mr. Garrett respectfully requests that this Court reverse his convictions and remand for a new trial.

Respectfully Submitted,

_____
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Certificate of Compliance and Service

I, Amy M. Bartholow, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **3,792** words, which does not exceed the 7,750 words allowed for appellant's reply brief.
- ✓ The floppy disc filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which is updated every Sunday (i.e., last updated on March 14, 2004). According to that program, the disc is virus-free.
- ✓ True and correct copies of the attached brief and floppy disc were mailed, this **18th day of March, 2004**, to Adriane Dixon Crouse, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

_____
Amy M. Bartholow